

LFC Requester:**Kelly Klundt**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment**
Correction **Substitute**

Date Jan. 14, 2016
Bill No: HB 55

Sponsor: Rep. David M. Gallegos & Rep. Nora Espinoza

Agency Code: 305

Short Title: Amend NM Religious Freedom Act

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE**BILL SUMMARY**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

House Bill 55 ("HB 55") amends the Human Rights Act ("HRA"), NMSA 1978, Section 28-1-1 through -15, and the New Mexico Religious Freedom Restoration Act ("NMRFRA"), NMSA 1978, Sections 28-22-1 through -5.

HB 55 modifies the definition subsection of the HRA and provides additional exemptions for religious and denominational institutions from the requirements under the HRA. Further, the amendment attempts to reduce the impact on certain public accommodations that resulted from the New Mexico Supreme Court's opinion in Elaine Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53.

Additionally, HB 55 (1) provides additional definitions under the NMRFRA; (2) prohibits a "person" from "restrict[ing] a person's free exercise of religion;" (3) reduces the number restrictions that are exempted under the NMRFRA; and (4) creates a private right of action against individuals and private entities in addition to governmental actors who violate the NMRFRA.

FISCAL IMPLICATIONS

None

SIGNIFICANT ISSUES

Section (1), p. 2, ln. 3–4: redefining "employer" to mean "any person employing a person" increases the number of individuals and legal entities that are covered under the definition, and thus, subject to the HRA. Potentially, this could significantly expand the coverage of the HRA and require all individuals and legal entities that have both formal and informal arrangements to exchange compensation for services rendered to comply with the requirements of the HRA or be subject to enforcement.

Section (2), p. 5, ln. 21–p.6, ln. 6: The amendment appears to provided religious and denominational institutions increased exemption from the HRA; to allow them to discriminate on the basis on "sexual orientation and gender identity" even when they engage

in “for profit activities...subject to the provisions of Section 511(a)” or “non-profit activities...subject to the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986.” This would eliminate protections previously provided by the HRA to certain individuals, which could raise an issue under the equal protection clause of the New Mexico Constitution and the United States Constitution. See Romer v. Evans, 517 U.S. 620 (1996); See also Griego v. Oliver, 2014-NMSC-003, 316 P.3d 865, ¶ 39-53 (holding that classification based on sexual orientation requires intermediate scrutiny under equal protection claim).

Section (2), p. 6, ln. 7-13: The amendment appears to permit discrimination by a public accommodation under certain conditions, such as sexual orientation and gender identity, which purports to undermine the rational of Elaine Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53. But also, it is unclear what standard would be required to hold a sincere religious belief, because (1) there is no objective measure or guidance on how to determine whether the belief is sincere and (2) the definition of “free exercise of religion” under HB 55 does not require a sincere belief or clearly define the amount of religious motivation required to qualify an act or refusal to act under the HRA. Also, because this section of the act would eliminate a protection previously provided to certain citizens, this could raise an issue under the equal protection clause of the New Mexico Constitution and the United States Constitution. See Romer v. Evans, 517 U.S. 620 (1996); see also Griego v. Oliver, 2014-NMSC-003, 316 P.3d 865, ¶ 39-53 (holding that classification based on sexual orientation requires intermediate scrutiny under equal protection claim).

Section (5), p. 8, ln. 17: Substituting “person” for “government agency” appears to significantly increase the scope of coverage of the NMRFRA, allowing for rights of action against private citizens and non-state legal entities, which could impinge upon their various individual rights under the New Mexico Constitution and United States Constitution.

Section (5), p. 8, ln. 20: Eliminating the modifier “directly” could significantly reduce the number of restrictions exempted even though they are in the form of a rule of general applicability. Under the plain language, HB 55 would appear to not even allow a rule of general applicability to place any restriction on the “free exercise of religion” even if it insignificantly or indirectly discriminated against religion or among religions.

Section (6), p. 9, ln. 8–16: Substituting “person” for “government agency” appears to significantly increase the scope of coverage of the NMRFRA, allowing for rights of action against private citizens and non-state legal entities, which could impinge upon their various individual rights under the New Mexico Constitution and United States Constitution. Also, it is unclear what HB 55 exactly what impact, if any, using the term persons as HB 55 does in this section would have on non-governmental entities in terms of the Tort Claims Act and the waiver of immunity.

Section (8), p. 10, ln. 6–7: Substituting “person” for “government agency” appears to significantly increase the scope of coverage of the NMRFRA, allowing for rights of action against private citizens and non-state legal entities, which could impinge upon their various individual rights under the New Mexico Constitution and United States Constitution.

PERFORMANCE IMPLICATIONS

None

ADMINISTRATIVE IMPLICATIONS

None

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None

TECHNICAL ISSUES

None

OTHER SUBSTANTIVE ISSUES

Section (1), p. 2, ln. 11–13: “An act or a refusal to act that is substantially motivated by religious belief” is unclear, because the standard, “substantially motivated” does not provide a concrete metric for how much of the act or refusal to act must be motivated by a religious belief to qualify for inclusion in the definition, nor does the definition as written require that the belief be sincere, and so the definition could potentially cover any act or refusal to act.

Section (4), p. 7, ln. 12–p. 8, ln. 1: The definition for “discriminatory action” under HB 55 is unclear because, as discussed above, the definition for a person’s free exercise of religion is not clearly defined and also because “in response to” does not necessarily require a causal link between that the action taken by the “person or government agency” and the act or refusal to act in the exercise of religion. Further, including “person” in as defined in HB 55 as a potential entity that could perform a “discriminatory action” under the NMRFRA could greatly increase the scope of coverage, allowing for rights of action against private citizens, which could impinge upon their various individual rights under the New Mexico Constitution and United States Constitution.

Section (7), p. 9, ln. 20–p. 10, ln. 2: Because of the way that “person” has been defined under HB 55 and the way it is used in this section, it is unclear whose actions and abilities would be limited, and thus, it is difficult to determine what the legal effect, if any, might be.

ALTERNATIVES

None

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status Quo

AMENDMENTS

None